

Supreme Court of the United States

OCTOBER TERM, 1968

No. 641

REYES ARIAS OROZCO,

Petitioner,

—v.—

TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Texas

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TRIAL DOCKET — CRIMINAL DISTRICT COURT — DALLAS COUNTY, TEXAS

BAIL STATUS: A. P. BOND

| STATE OF TEXAS | ATTORNEYS | OFFENSE |
|--------------------|-------------------|---|
| REYES ARIAS OROZCO | Mike Barclay | Murder with malice, as charged in the indictment MURDER WITH MALICE, AS CHARGED IN THE INDICTMENT |
| | A. P. BOND \$2500 | 1-15-66 |

| DATE OF ORDER | ORDERS OF COURT | REC | NOV | OFFICE OF SUPREME |
|---------------|--|-----|-----|----------------------|
| APR 4 - 1966 | To be arraigned | | | |
| APR 25 1966 | Re: 15-1547 | | | |
| MAY 9 - 1966 | Re: 15-1547 Arraigned to stand trial | | | |
| MAY 23 1966 | Arraigned to stand trial | | | |
| JUN 13 1966 | Arraigned to stand trial | | | |
| JUL 18 1966 | Arraigned to stand trial | | | |
| AUG - 8 1966 | " To be released | | | |
| AUG 22 1966 | Notitia filed by State charging death penalty. Both sides may present jury panel of 45 called + 12. Juries will be 12 + 6. Verdict: death or the death will be granted. | | | |
| AUG 23 1966 | Charge + requirement. Being verdict of guilty as such is not gegeen to set punishment! if the State has furnished a 10 years in Texas penitentiary; prosecution denied Notitia for new tri- (1970) | | | |

1
TRIAL DOCKET — CRIMINAL DISTRICT COURT — DALLAS COUNTY, TEXAS

C-66-1223 LH

No. _____

FORM 503 REV.

| AS | ATTORNEYS | OFFENSE | DATE OF FILING |
|------|-------------------|---|----------------|
| DZCO | Mike Barclay | Murder with malice, as charged in the indictment MURDER WITH MALICE, AS CHARGED IN THE INDICTMENT | MAR 21 1968 |
| | A. P. BOND \$2500 | 1-15-66 | |

ORDERS OF COURT

To the Clerk

Be set to trial 7-3-68
Plead to guilt to the jury
or not guiltyPlead to be with him
" to the ClerkKittin, filed by state attorney, death penalty,
Both sides ready for trial, jury panel of 45 called & examined
12 jurors selected & sworn; arraigned
plea not guiltyCharge 1: aggravated robbery of Wally as charged;
jury is not yet agreed to set punishment; 1st trial
definitely pronounced a 10 years in prison & life
sentence; probation denied; Kittin for new trial in 1st trial
(over)

RECEIVED

NOV 16 1968

OFFICE OF THE CLERK
SUPREME COURT, D.C.

STATE OF TEXAS

vs. No. _____

DATE OF ORDER

ORDERS OF COURT

Offender has the 10 days for sentencing & is
not less than 2 yrs here. They go to
Texas - still Haven't got to make a
court date, it's only been 2 years of
the sentence of criminal offense of Texas &
Bail fixed at \$500.

XAS

ORDERS OF COURT.

Defendant denies the 10 days for sentencing & is sentenced
not less than 2 nor more than 70 years
in Texas State Penitentiary to serve the term of
the court debt, safely & for want of official
in the cause of criminal appeals of Texas & County
Court fixed at \$500.

IN THE CRIMINAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. C-66-1228-LH

COURT CHARGE ON CIRCUMSTANTIAL EVIDENCE

This is a case depending for conviction on circumstantial evidence. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable, and moral certainty that the accused, and no other person, committed the offense charged.

But in such cases it is not sufficient that the circumstances coincide with, account for and therefore render probable, the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt, and unless they do so, beyond a reasonable doubt, you will find the defendant not guilty.

CRIMINAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

JULY TERM, A. D. 1966

No. C-66-1228-LH

THE STATE OF TEXAS

vs

REYES ARIAS OROZCO

MINUTES—August 23 A. D. 1966

The Defendant having been indicted in the above entitled and numbered cause for the offense Murder with Malice, as charged in the indictment a capital felony, and this day this cause being called for trial, the State appeared by her Criminal District Attorney, and the Defendant Reyes Arias Orozco appeared in person, his counsel also being present, and both parties announced ready for trial, and the Criminal District Attorney having made known to the Court in writing that the State would not seek the death penalty in the trial of this said cause. The said Defendant in open Court was duly arraigned, and pleaded Not Guilty, to the charge contained in the indictment; herein; thereupon a jury, to-wit: Charles W. Worley and eleven others, was duly selected, impaneled and sworn, who, having heard the indictment presented, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, as to their duty to determine the guilt or innocence of the Defendant, and after having heard the arguments of counsel, retired in charge of the proper officer to consider of their verdict, and afterward were brought into open Court, by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open Court, the following verdict, which was received by the Court, and is here now entered upon the minutes of the Court, to-wit:

We, the jury, find the defendant guilty of murder with malice as charged in the indictment.

/s/ CHARLES W. WORLEY,
Foreman

It is therefore considered and adjudged by the Court, that the said Defendant is guilty of the offense of Murder with Malice as charged in the indictment, as found by the jury, and no further evidence being heard by the Court, it is further adjudged by the Court that Defendant be punished, as has been determined by the Court, by confinement in the Texas Department of Corrections for 10 years, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue; and that said Defendant is remanded to the Sheriff of Dallas County to await the further order of the Court herein.

/s/ J. FRANK WILSON
Judge
Criminal District Court
of Dallas County, Texas

ENDORSEMENT ON INSTRUMENT NO. C-66-1228-LH
Judgment

The State of Texas vs. Reyes Arias Orozco
Recorded: Vol 6 Pg 269, Minutes, Criminal District
Court No. of Dallas County, Texas.

* * *

CRIMINAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. C-66-1228-LH

THE STATE OF TEXAS

vs.

REYES ARIAS OROZCO

SENTENCE—August 23, 1966

Murder with Malice, as charged in the indictment.

This Day this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, Reyes Arias Orozco appeared in open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him at a former time; and thereupon the said Defendant, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, that the said Defendant, who has been adjudged to be guilty of Murder with Malice as charged in the indictment, as found by the jury, and whose punishment has been assessed by the Court at confinement in the Texas Department of Corrections for 10 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Director of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Texas Department of Corrections, for not less than 2 nor more than 10 years years, in accordance with the provisions of the law governing the Texas Department of Corrections of said State, and the said Defendant is remanded to jail until said Sheriff can obey

the direction of this sentence. Defendant gave notice of appeal to Court of Criminal Appeals in Austin.

/s/ J. FRANK WILSON
Judge
Criminal District Court
of Dallas County, Texas

ENDORSEMENT ON INSTRUMENT: Sentence

The State of Texas vs. Reyes Arias Orozco
Recorded: Vol 6 Pg 269, Minutes, Criminal District
Court of Dallas County, Texas.

• • • •

[fol. 34]

IN THE CRIMINAL DISTRICT COURT
OF DALLAS COUNTY, TEXAS

No. C-66-1228-LH

STATEMENT OF FACTS

Testimony of Dr. Earl Forrest Rose

Q All right, would you mark this?

(State's Exhibit No. 1 was marked for identification purposes.)

Q I'll show you what's been marked as State's Exhibit No. 1 and ask you to tell the jury what that is?

A This is the missile that I removed from the body identified to me as John Hugh Elliott. My Medical Legal Autopsy No. 7, 1966.

MR. CAPERTON: We offer this into evidence at this time.

THE COURT: Objections?

MR. BARCLAY: If the Court please, at this time I would make an objection to the offering of this into evidence at this time. I don't have any objections to him calling this witness out of order but I don't believe he had laid a proper predicate for the purpose of submitting this into evidence at this particular time.

MR. CAPERTON: The only purpose is to show that this is the bullet that was removed from the body and he's the only one that can testify to that.

THE COURT: Overrule the objection.

MR. BARCLAY: Exception.

[fol. 35] THE COURT: Admitted into evidence.

(Whereupon State's Exhibit No. 1 was admitted into evidence.)

Q How are you able to identify this bullet?

A I'm identifying it because of the marks I made on the bullet.

Q Okay, that's good enough. Then, were you able to, from your autopsy that you performed, to determine the cause of death of John Hugh Elliott?

A Yes, sir.

Q Would you tell the jury what that was?

A This was a gunshot wound of the abdomen.

MR. CAPERTON: No further questions.

THE COURT: Cross examine.

[fol. 75]

C. W. BROWN,

a witness called by the State, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAPERTON:

Q Would you state your name for us, please, sir?

A C. W. Brown.

Q How are you employed?

A City of Dallas Police Department.

Q Were you a police officer for the City of Dallas back on January the 5th, 1966?

A Yes, sir, I was.

Q Who was your partner on that day?

A Blessing was my partner.

Q What were your hours of duty that night?

A Working from six until twelve.

[fol. 76] Q You're supposed to get off at twelve o'clock?

A Off at twelve.

Q Did you get off at twelve o'clock that night?

A No, we didn't.

Q What did you do that night?

A Well, we answered a call on McKinney, on Cedar Springs with a uniformed squad and I was working in the capacity as a plain-clothes officer with Mr. Blessing.

Q All right, was that at the El Farleto Cafe?

A Yes, sir.

Q Where did you go, if anywhere?

A We walked from that location, we went to Parkland Hospital and viewed the body at that location.

Q Whose body did you view there?

A It was a man that was a white man that's supposed to have gotten shot there and the ambulance had left and we left the El Farleto.

Q That's John Hugh Elliott's body?

A Yes, sir.

Q Was he alive or dead when you—

A —dead when we got to Parkland.

Q Where did you go from there, sir?

A We had a witness that had to go with the uniformed squad to Parkland Hospital, they were still at Parkland when we got there, it was an Indian man descent. He [fol. 77] showed us where another boy, and told us about another boy who had been at that location—

MR. BARCLAY: Object to that.

MR. CAPERTON: Don't go into anything.

THE COURT: Yeah.

Q Was that James Ishcomer?

A Yes, sir.

Q Did you talk to him?

A Yes,

Q Where did you go after that?

A We took him to another apartment and talked to the people there and then took him home from that location.

Q Okay, then where did you go, if anywhere?

A We found out who this other man was that was with the Defendant, where he lived, and we went to his home in Oak Cliff.

Q Was that Hosea Miramontes?

A Yes.

Q From his house where did you go?

A Came by town and came up Commerce and Akard and was going to show us where he let a girl out.

MR. BARCLAY: Objection. If the Court please, I'll have to make an objection to the conversation and fruits of the conversation.

THE COURT: He said he was going to show him or

[fol. 78] he was going to show them where he let a girl out, he didn't say nothing about what he said or nothing.

MR. BARCLAY: Exception.

Q (Continuing) That was Hosea Miramontes that you had in your car at that time?

A That's right.

Q From this location, did he show you a location?

A Yes, he did on Lemmon Avenue.

Q Okay, then what did you do after that?

A We took him, after he showed us the house, we took him over to the City Hall and booked him for investigation of murder, then we returned to the location on Lemmon Avenue that he pointed out to us.

Q All right, what did you do at that location on Lemmon Avenue?

A This was about four in the morning and we got to this location. Also, he pointed a car that this man was driving in the driveway and he said that that's the car that he was in.

MR. BARCLAY: Objection.

THE COURT: Sustain the objection.

Q Let's not go into anything he did, you later went into that house?

A Yes, sir, we returned to the location and knocked on the door.

[fol. 79] MR. BARCLAY: If the Court please, I'd like to make an objection now with reference to the testimony about going into this house and the probability of going into this house, could I have the witness on voir dire examination?

THE COURT: Yeah.

VOIR DIRE EXAMINATION

BY MR. BARCLAY:

Q Mr. Brown, at the time you arrived at this house on Lemmon Avenue, who was with you?

A With me, Mr. Blessing, my partner was the only one.

Q All right, was there any uniformed officers?

A We called for them later, yes, sir.

Q All right, they came after?

A They arrived shortly after we had gotten there; they were with us at the time of the arrest.

Q All right, now, at the time that you went to the house, did you have a warrant?

A No.

Q Did Mr. Blessing have a warrant?

A No, sir.

MR. BARCLAY: If the Court please, I'll have to make an objection now as to the, any further testimony with reference to the entrance of that particular dwelling on the grounds that the search and arrest at that particular [fol. 80] time would not be in accordance with the Code of Criminal Procedure.

MR. CAPERTON: Now, Your Honor, I haven't gone far enough, this is the first trip to the house and this is about four o'clock in the morning. I haven't gone far enough yet with my questions to get down—

THE COURT: Go ahead.

Q (By Mr. Caperton) At this time you didn't go into the house the first time you went there, is that right?

A No, sir, drove by that location.

Q Did you go get a warrant?

A No.

Q All right, when did you come back to the house?

A Immediately after we put the other boy in jail.

A All right,—

A Miramontes.

Q Did you go then back up to the house?

A Back to the location on Lemmon Avenue.

Q All right, whose house was it, if you know?

A I don't recall, the Defendant did live there.

Q Okay, do you recall the lady's name who lived there?

A (Witness nods head.)

Q Did you have a good reason to believe that a felony had been committed?

A Yes, sir.

[fol. 81] Q And—

MR. BARCLAY: Object to that, Your Honor, there's no predicate for that.

THE COURT: Overruled.

MR. BARCLAY: Exception.

Q (Continuing) And that the Defendant or suspect was there and there was a chance of his escaping?

A That's true.

Q All right.

MR. BARCLAY: Objection, no predicate.

THE COURT: Overruled.

MR. BARCLAY: Exception.

Q What did you do when you got to the house?

A Before we arrived at this house on this second street, my partner and myself, we called for a uniformed squad to meet us up there at that location. We had arrived there just about the same time, more or less, simultaneously, and we got out and told them what we had and we slipped up and so we went behind the house, some on the side and some to the front.

Q Did you go to the front or back?

A I went to the front.

Q What did you do when you got to the door?

A Knocked on the door and a lady came to the door. We identified ourselves as being police officers and wanted to talk to this man; ask if he was home and she said yes. [fol. 82] MR. BARCLAY: Objection.

THE COURT: Overruled.

MR. BARCLAY: I'm going to make an objection—

THE COURT: —just a minute.

MR. BARCLAY: I'm going to make an objection to the conversation between the witness and the woman at the house on the grounds that it would be hearsay.

THE COURT: Was it in the presence of the Defendant?

A He was in bed asleep at that time, yes, Judge.

MR. CAPERTON: I won't go into that, Judge, I'll withdraw that question about what she said.

Q Then you went inside the house?

A We were invited in, yes, sir.

Q All right, what did you do after you got in?

MR. BARCLAY: If the Court please, I'm going to make an objection at this time to any further reference to the entrance of this particular house on the grounds that the testimony shows that the man was sound asleep

at that time and there is no good reason to show why he couldn't have gotten a warrant or warrant of arrest to search the premises.

THE COURT: Overruled.

MR. BARCLAY: Exception.

Q Okay, you may answer the question. What did you do after you got inside?

[fol. 83] A We walked in and the lady pointed to the room where this Defendant was asleep. He was awake when we got into the room and evidently heard the conversation, I don't know, but he was awake anyway.

Q Okay.

A And we asked him his name, I did. He told me.

MR. BARCLAY: Objection.

THE COURT: Overruled.

MR. BARCLAY: If the Court please, at this particular time, I'm going to make an objection to any line of questioning with reference to any conversation between this particular witness and the Defendant, could I have him on voir dire examination?

THE COURT: Not at this time, you can cross examine him.

MR. BARCLAY: Objection.

THE COURT: Overrule the objection.

MR. BARCLAY: Exception.

Q What name did he give you, do you see him in the courtroom?

A Yes, I see—no, it's been a long time and I don't recall. I haven't had a chance to go over my notes, I don't recall the names involved in this. I do remember the Defendant, the last man on the left down here at your table.

Q That's the man?

[fol. 84] A That's the man that I had my conversation with and I don't remember his name, I remember the incident but the name I don't recall now. I haven't had a chance to look over my notes.

Q About what time of day was this?

A That I talked to him?

Q Yeah.

A That was around, well, after four o'clock, it was around four o'clock, give or take thirty minutes.

Q Okay, now, what did you say, if anything, to him besides, "What's your name?"

A Yes, I don't recall all the conversation, I asked him his name and he told me and I asked him if he had been out to the El Farleto that night.

MR. BARCLAY: Objection.

THE COURT: Overruled.

MR. BARCLAY: Could I have the witness on voir dire examination?

THE COURT: No.

MR. BARCLAY: Exception.

THE COURT: Go ahead.

THE WITNESS: He said he had. I asked him if he owned a pistol.

MR. BARCLAY: Objection.

THE COURT: Overruled.

[fol. 85]. MR. BARCLAY: Exception.

THE WITNESS: He said yes. I said, "Where is it," and he didn't answer at first. Then I asked him again, he say, "It's in the back in the washing machine."

Q (Continuing) Okay, did you go back to the washing machine?

A Yes, I asked him where the washing machine was and he pointed to a little small room in the back of the house.

Q I'll show you what's been marked for identification purposes as State's Exhibit No. 3 and 4 and ask you if you can identify these and, if so, how?

A Yes, sir, we went back to the back room, or I did, and there was a bunch of clothes in a wringer type washing machine. I took some of the clothes out, I didn't see the pistol at first. The washing machine was just about full of clothes so he came back about that time, I'll say he, the Defendant, and he was going to show us where it was so I uncovered it some more, the clothes, and took them out of the washing machine and I saw the pistol then, and I told him I would get it. This is the pistol that was taken from the washing machine by myself about 4:30 in the morning.

Q. What did you do with it after you took it out of the washing machine?

A. I checked it and unloaded it.

MR. BARCLAY: If the Court please, I'm going to [fol. 86] make an objection on the grounds that the testimony is unresponsive to the question. He asked him if he could identify it then he asked him if he could identify it in what manner and how.

MR. CAPERTON: He said he could, then I asked him what he did with it—how could you identify it again?

A. By markings that we have.

Q. You marked on it yourself?

A. Yes, sir, I have a B right here.

Q. All right, now, what did you do with it after you left the house?

A. We brought it to the City Hall and put it in our Police Property Room.

Q. All right, tell the jury what place in the Police Property Room you put it?

A. It's in the basement of the City Hall. We take it down there, at that time of the morning out identification or Crime Lab is not open at that time. We put it in there and mark it as evidence and the people who come on duty from the laboratory the next morning, they go down and check the property out with whatever kind of analysis, whatever it might be.

Q. Did you ask for any type of analysis on this pistol?

A. Yes, we did.

Q. What type was that?

A. Ballistics type analysis that we send to Parkland [fol. 87] Hospital.

Q. All right, now, is the tag on State's Exhibit No. 4 the tag that you placed on there?

A. Yes, this is the same tag, this is my writing here.

Q. And that's the same pistol that you picked up?

A. Yes, it is. I had marked it here at the time I got it. I marked it in the living room of the home where he was arrested.

MR. CAPERTON: Okay, that's all the question I have.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. BARCLAY:

Q Mr. Brown, at the time you walked into the bedroom there where the Defendant was in bed, was he free to come and go at that time?

A As far as we were concerned, all I wanted to know was his name.

Q I see, when you ascertained his name, was he free to leave?

A No.

Q So, all right, so during the time that you had this conversation with him pertaining to the gun, he was under arrest, is that correct?"

A Yes. After I found out his name.

MR. BARCLAY: All right, now, at this time, we'll [fol. 88] object to any testimony with reference to any conversation pertaining to this particular gun or any conversations with reference to any subject matter between the witness and the Defendant at that particular time on the grounds that the State has failed to lay a proper predicate; further object to the manner and method in which the arrest and search was perfected; and further on the grounds that it fails to meet with the provisions outlined by the Code of Criminal Procedure; and furthermore, specifically, on the grounds that the Prosecution has failed to provide testimony to show that the police department obtained a search warrant or warrant of arrest at that particular time.

THE COURT: Overruled.

MR. BARCLAY: Exception.

THE COURT: Any questions?

MR. BARCLAY: That's all.

MR. CAPERTON: No further questions.

* * * * *
[fol. 92] Testimony of F. T. Alexander

BY MR. CAPERTON:

Q (Continuing) Your duties in regard to the missile in the box marked State's Exhibit No. 1 and the pistol and clip that you received, you were to see if that missile had been fired from that weapon, is that right?

A That's right, yes, sir.

Q And could you make a determination in this case?

A I could.

Q How did you go about making your determination?

A I test fired the gun and recovered the bullet in the bullet recovery box, then I checked the number of lanes and grooves of each of them which then I made a microscopic examination of the evidence bullet against the test bullet fired through this gun.

Q All right, did you fire more than one bullet through the gun?

A Yes, sir, I fired several through it.

Q Tell the jury how you recovered these bullets that you fired through—

A I fired the gun into a bullet recovery box which is full of cotton waste, then I have it divided up into sections; there is a small paper card between each section, then I look for the last paper card that the bullet has [fol. 93] gone through and I recovered it in the waste and in that area.

Q Then the comparison was made by you?

A Yes, sir.

Q And your testimony here is then that the evidence bullet in State's Exhibit No. 1 and the test bullet fired through the weapon came from the same gun?

A Yes, sir.

Q That would be State's Exhibit No. 4?

A No. 3.

Q No. 3, okay.

A Yes, sir.

[fol. 119] CLOSING JURY ARGUMENTS

MR. REESE: I think at that point he couldn't bring himself or he wouldn't do it, he wouldn't tell you that he saw this Defendant shoot him. He said the Defendant then got in the car and that they drove off; that he saw a pistol in the car all right on the seat. Before they got in the car initially, I believe that Hosea said he had gotten in the car and there was nothing about any pistol being on the seat when he got in the car, so it must have

been put on the seat after all this occurred, after the shooting occurred. He did say that the pistol that we showed you was not the one that he saw on the seat and I submit to you that that's not true. There's only one place the pistol could have come from and that's from the Defendant and sure enough C. W. Brown went to the Defendant's house and asked him if he had a pistol and he said yeah, asked him if he wasn't at the cafe, yes, he was there, asked him where the pistol was and they went to the washing machine. He didn't have it where someone ordinarily keeps a pistol, he had it stuck down under some clothes in the washing machine. So they recovered the pistol, eventually got it out to the Crime Laboratory and Lieutenant Alexander examined it and made some test firings and, sure enough, the bullet that killed John Hugh Elliott came from the pistol owned by this—

MR. BARCLAY: —If the Court please, I'm going to [fol. 120] make an objection to that line of argument about that particular pistol since it was not offered into evidence.

THE COURT: Overruled.

MR. BARCLAY: Exception.

MR. REESE: We can not, at this time, go into why the pistol was not introduced into evidence. At any rate, you know that is what occurred, whether or not the pistol is sitting here in front of you or not. These people tell you what they did; they recovered this Defendant's weapon from his house, hidden in his house; that's the weapon that fired the fatal bullet, there's no question about it. Now, you must decide this case on the evidence presented from the witness stand.

THE COURT: Eight minutes.

[fol. 131] MR. CAPERTON: —* * * There's no self-defense charge in this charge, gentlemen, there is not a word about self-defense in this charge because it's not raised by the evidence, but the only thing he said was, "Let's go." All right, does an innocent man hide, does he go home and hide a pistol down under a bunch of clothes in a washing machine? No, sir! * * *

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS AT AUSTIN

No. 40,706

REYES ARIAS OROZCO, APPELLANT

v/s.

THE STATE OF TEXAS, APPELLEE

Appeal from Dallas County

OPINION—December 6, 1967

The offense is murder with malice; the punishment, 10 years.

Trial was before a jury on a plea of not guilty. The state having waived the death penalty and the jury having found appellant guilty of murder with malice, the court assessed the punishment.

The facts necessary for consideration and disposition of the grounds of error set forth in appellant's brief, filed in the trial court, reflect the following: Appellant was seated in a booth near the front door of the El Farleto Cafe in Dallas with Hosea Miramontes and Joanne Parris when John Hugh Elliott, the deceased, came in and sat in a booth some six feet away. After eating his food and having some conversation with Joanne, the nature of which is not disclosed, the deceased left the cafe.

Shortly after that appellant and Joanne left, as did Miramontes. An argument ensued and deceased, who had gotten in his car and was driving away, pulled back into the parking place alongside of the Miramontes car and, according to the testimony of Miramontes, the deceased beat appellant about the face with his hands and called him "Mexican Grease." A shot was fired and Miramontes drove Joanne and appellant from the scene and, after letting appellant out, drove Joanne to the corner of Commerce and Akard and let her out.

James Ishcomer, referred to as an Indian man, and his companions, who left the cafe about ten minutes later,

found Elliott, the deceased, slumped over the steering wheel of his car and thought that "a little mickey" had been put in his drink and that he was drunk, but when they raised him up they saw a bullet hole; took him out of the car and attempted to revive him by mouth to mouth artificial respiration.

Patrolman J. W. Johnson, of the Dallas Police Department, testified that while on duty on the late night shift on January 5, 1966, with another officer, he noticed 5 or 6 persons standing on the sidewalk on the west side of Cedar Springs, where there was a car with the door open. When these people saw the squad car they began to wave, and he noticed that there was a man lying in the parking area with one leg inside a Ford station wagon. Those standing by said they thought he was drunk, but "when we went to this gentleman laying on the ground and found he wasn't drunk but he had been shot—we called for an ambulance" and "for a detective squad, supervisor and crime lab."

"Q. I guess the Crime Lab is the one that made the picture?

"A. Yes, sir.

"Q. Okay, now, did you stay there at the scene or did you leave?

"A. No, sir, we stayed there, we tried to get all the witnesses, anyone that knew anything about it. We tried to get them to one side, they left before we got the information that we needed.

"Q. Were there any witnesses out there actually?

"A. Yes, sir, there were witnesses, I don't know whether they were the ones on the direct shooting because I didn't question any of the witnesses, detectives questioned the witnesses.

"Q. That's what I meant, was there any witnesses to the shooting itself? Was James Ishcomer one of the men that was out there?

"A. Yes, sir, the Indian.

"Q. Did anyone show up from the Homicide Bureau?

"A. Yes, sir.

"Q. Who were the detectives in the Homicide Bureau?

"A. I believe it was Detective Blessing and Charlie Brown."

Patrolman Jerry C. Scarbrough testified that he was one of the arresting officers; that Officer Stubbs rode with him and they with two Homicide detectives, one of whom was Charlie Brown and the other a detective he did not know personally, went to "a private residence" on Lemmon Avenue arriving about the same time; that he went to the back of the house and the other officers went to the front; that he later went inside the house and was in the back room when the pistol was found in the washing machine.

We quote from the testimony of state's witness Brown:

"Q. Were you a police officer for the City of Dallas back on January the 5th, 1966?

"A. Yes, sir, I was.

"Q. Who was your partner on that day?

"A. Blessing was my partner.

"Q. What were your hours of duty that night?

"A. Working from six until twelve.

"Q. You're supposed to get off at twelve o'clock?

"A. Off at twelve.

"Q. Did you get off at twelve o'clock that night?

"A. No, we didn't.

"Q. What did you do that night?

"A. Well, we answered a call on McKinney, on Cedar Springs with a uniformed squad and I was working in the capacity as a plain-clothes officer with Mr. Blessing.

"Q. All right, was that at the El Farleto Cafe?

"A. Yes, sir.

"Q. Where did you go, if anywhere?

"A. We walked from that location, we went to Parkland Hospital and viewed the body at that location.

"Q. Whose body did you view there?

"A. It was a man that was a white man that's supposed to have gotten shot there and the ambulance had left and we left the El Farleto.

"Q. That's John Hugh Elliott's body?

"A. Yes, sir.

"Q. Was he alive or dead when you—

"A. —dead when we got to Parkland.

"Q. Where did you go from there, sir?

"A. We had a witness that had to go with the uniformed squad to Parkland Hospital, they were still at Parkland when we got there, it was an Indian man descent. He showed us where another boy, and told us about another boy who had been at that location—

"MR. BARCLAY: Object to that.

"MR. CAPERTON: Don't go into anything.

"THE COURT: Yeah.

"Q. Was that James Ishcomer?

"A. Yes, sir.

"Q. Did you talk to him?

"A. Yes.

"Q. Where did you go after that?

"A. We took him to another apartment and talked to the people there and then took him home from that location.

"Q. Okay, then where did you go, if anywhere?

"A. We found out who this other man was that was with the Defendant, where he lived, and we went to his home in Oak Cliff.

"Q. Was that Hosea Miramontes?

"A. Yes.

"Q. From his house where did you go?

"A. Came by town and came up Commerce and Akard and was going to show us where he let a girl out.

"Q. That was Hosea Miramontes that you had in your car at that time?

"A. That's right.

"Q. From this location, did he show you a location?

"A. Yes, he did on Lemmon Avenue.

"Q. Okay, then what did you do after that?

"A. We took him, after he showed us the house, we took him over to the City Hall and booked him for investigation of murder, then we returned to the location on Lemmon Avenue that he pointed out to us.

"Q. (By Mr. Caperton). At this time you didn't go into the house the first time you went there, is that right?

"A. No, sir, drove by that location.

"Q. Did you go get a warrant?

"A. No.

"Q. All right, when did you come back to the house?

"A. Immediately after we put the other boy in jail.

"Q. All right,—

"A. Miramontes.

"Q. Did you go then back up to the house?

"A. Back to the location on Lemmon Avenue.

"Q. All right, whose house was it, if you know?

"A. I don't recall, the Defendant did live there.

"Q. Okay, do you recall the lady's name who lived there?

"A. (Witness nods head.)

"Q. Did you have a good reason to believe that a felony had been committed?

"A. Yes, sir.

"Q. (Continuing) And that the Defendant or suspect was there and there was a chance of his escaping?

"A. That's true.

"Q. All right.

"MR. BARCLAY: Objection, no predicate.

"THE COURT: Overruled.

"MR. BARCLAY: Exception.

"Q. What did you do when you got to the house?

"A. Before we arrived at this house on this second street, my partner and myself, we called for a uniformed squad to meet us up there at that location. We had arrived there just about the same time, more or less, simultaneously, and we got out and told them what we had and we slipped up and so we went behind the house, some on the side and some to the front.

"Q. Did you go to the front or back?

"A. I went to the front.

"Q. What did you do when you got to the door?

"A. Knocked on the door and a lady came to the door. We identified ourselves as being police officers and wanted to talk to this man; ask—if he was home and she said yes.

"Q. Then you went inside the house?

"A. We were invited in, yes, sir.

"Q. All right, what did you do after you got in?

"MR. BARCLAY: If the Court please, I'm going to make an objection at this time to any further reference to the entrance of this particular house on the grounds that the testimony shows that the man was sound asleep at that time and there is no good reason to show why he couldn't have gotten a warrant or warrant of arrest to search the premises.

"THE COURT: Overruled.

"MR. BARCLAY: Exception.

"Q. Okay, you may answer the question. What did you do after you got inside?

"A. We walked in and the lady pointed to the room where this Defendant was asleep. He was awake when we got into the room and evidently heard the conversation. I don't know, but he was awake anyway.

"Q. Okay,

"A. And we asked him his name, I did. He told me.

"MR. BARCLAY: Objection.

"THE COURT: Overruled.

"MR. BARCLAY: If the Court please, at this particular time, I'm going to make an objection to any line of questioning with reference to any conversation between this particular witness and the Defendant, could I have him on voir dire examination?

"THE COURT: Not at this time, you can cross examine him."

"Q. About what time of day was this?

"A. That I talked to him?

"Q. Yeah.

"A. That was around, well, after four o'clock, it was around four o'clock, give or take thirty minutes.

"Q. Okay, now, what did you say, if anything, to him besides 'What's your name?'

"A. Yes, I don't recall all the conversation, I asked him his name and he told me and I asked him if he had been out to the El Farleto that night.

"MR. BARCLAY: Objection.

"THE COURT: Overruled.

"MR. BARCLAY: Could I have the witness on voir dire examination?

"THE COURT: No.

"MR. BARCLAY: Exception.

"THE COURT: Go ahead.

"THE WITNESS: He said he had. I asked him if he owned a pistol.

"MR. BARCLAY: Objection.

"THE COURT: Overruled.

"MR. BARCLAY: Exception.

"THE WITNESS: He said yes. I said, 'Where is it,' and he didn't answer at first. Then I asked him again, he says, 'It's in the back in the washing machine.'

"Q. (Continuing) Okay, did you go back to the washing machine?

"A. Yes, I asked him where the washing machine was and he pointed to a little small room in the back of the house.

"Q. I'll show you what's been marked for identification purposes as State's Exhibit No. 3 and 4 and ask you if you can identify these and, if so, how?

"A. Yes, sir, we went back to the back room, or I did, and there was a bunch of clothes in a wringer type washing machine. I took some of the clothes out, I didn't see the pistol at first. The washing machine was just about full of clothes so he came back about that time, I'll say he, the Defendant, and he was going to show us where it was so I uncovered it some more, the clothes, and took them out of the washing machine and I saw the pistol then, and I told him I would get it. This is the pistol that was taken from the washing machine by myself about 4:30 in the morning.

"Q. What did you do with it after you took it out of the washing machine?

"A. I check it and unloaded it."

The pistol referred to in the testimony of Officer Brown was shown by the evidence to have been the gun from which the bullet which killed the deceased was fired.

Appellant's first and principal ground of error is:

"The arrest of the defendant without warrant and without probable cause rendered evidence seized from private residence of defendant in a warrantless search inadmissible."

Assuming that no warrant of arrest had been issued, we do not agree that the arrest was unlawful or that the pistol, the only evidence seized, was obtained as the result of an unlawful search or that the pistol was seized from the private residence of appellant.

A number of police officers participated in searching for those who fled the scene leaving the dying man near the cafe. They received information from Ishcomer and then from Miramontes which led them to the private residence of a lady whose name Officer Johnson did not recall, or did not give, where appellant had a room. They were admitted to the house by a lady who answered their knock and said that he was in his room asleep. They made no unlawful entry into the house, but were invited in.

Contemporaneous with the arrest Officer Brown asked appellant his name; if he had been out to the El Farleto Cafe that night; if he owned a pistol; and "where is it?" in answer to which questions appellant gave his name, answered the next two questions in the affirmative and the last: "It's in the back in the washing machine." Appellant then pointed out to the officers a small room in the back of the house where the washing machine was, and he was there when Officer Brown uncovered the pistol, checked it and unloaded it.

While such is argued, the ground of error does not complain that these statements of appellant should have been excluded for lack of warning required by *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, cited by appellant, but complain of evidence seized as a result of an unlawful arrest without warrant.

Miranda v. Arizona, and *Escobedo v. Illinois*, supra, apply to in-custody interrogation without regard to wheth-

er the arrest was unlawful but do not protect the accused to the extent that no inquiry at all is permissible without prior warning.

For a discussion of "custodial interrogation" under the doctrine of *Miranda v. Arizona*, *supra*, see *Gaudio v. State*, 230 A. 2d 700, 1 Md. 455.

There is no doubt that the statements of appellant were made contemporaneous with his arrest and that the officers went to the house for the purpose of arresting him, and did arrest him as soon as they satisfied themselves that he was the man that was named by Miramontes. In fact the state offered testimony of another police officer (Scarborough) to the effect that he was one of the arresting officers and that they went to the house for the purpose of executing a warrant which he had seen but which was not in his possession.

We hold that the further inquiry which led to the finding of the pistol was not precluded under *Miranda v. Arizona*, *supra*.

We are not impressed with the contention that *Warden v. Hayden*, — U.S. —, 18 L. Ed. 2d 782, 87 S. Ct. —, may be distinguished by the fact that it required more than three hours for the officers to find appellant whereas, in *Warden v. Hayden*, *supra*, information was immediately relayed to the police by cab drivers who followed the robber from the scene and the police immediately proceeded to the house where they found the defendant, asked him to get out of bed and get dressed and arrested him, and within one hour of their entry into the house, found a sawed off shotgun in the flush tank of the commode in the bathroom, and a sweater and cap similar to those that the robber had reportedly been wearing.

Warden v. Hayden, *supra*, supports our conclusion that the officers acted reasonably when they entered the house in search of the man whose name they had been given and for the pistol he had used to shoot the deceased.

In the recent case of *U.S. v. Agy*, 374 Fed. 2d 94, the defendant, when encountered by federal agents and questioned as to the contents of a truck, made an incriminating admission which was corroborated by an immediate search. The Court of Appeals held that it was unneces-

sary to determine whether probable cause for the search existed in the absence of the defendant's admission; that the agents could testify as to the contents of the truck and the admissions of the defendant need not have been excluded.

Agy was cited by this court in Sutton v. State, No. 40,544, decided on rehearing November 1, 1967.

In Galloway v. State, No. 40,604, decided October 18, 1967, the defendant stated to the officers who were invited into the house, and who inquired of him where the pistol was he had used in the shooting the night before, that it was in his house, and handed the pistol to the officers. This court overruled the contention that such evidence was procured as the result of an unlawful arrest. Hinkley v. State, 389 S.W. 2d 667, was cited in support of such holding.

Appellant's next ground of error is that the court erred in permitting the state to claim surprise and impeach a state's witness without laying a proper predicate for such claim of surprise.

This claim of error relates to the witness Miramontes who testified that he did not see Shorty (referring to appellant) shoot the deceased but heard a shot. He was then asked by counsel for the state, and answered over the objection set out:

"Q. Do you remember the Assistant District Attorney that was present at that examining trial ask you if, 'Did you see a man get shot on that evening—

"MR. BARCLAY: If the Court please, I'm going to object to the District Attorney trying to impeach his own witness.

"THE COURT: You plead complete surprise or not?

"MR. CAPERTON: Yes, Your Honor, because he's testifying to something that he did not testify to at the examining trial.

"THE COURT: Overrule the objection.

"Q. (Continuing) Did the Assistant District Attorney ask you the question, 'Did you see a man get shot on that evening?'

"A. Yes, he asked me that question.

"Q. Do you remember your answer?

"A. I told him I heard a shot.

"Q. Was your answer to that question, "I saw a man get shot."

"A. Yes, u-huh."

We find no harm or detriment to appellant in the testimony of the witness as to the question asked and the answer given by him at the examining trial.

In view of the objection and of the testimony elicited, the contention that no proper predicate was laid is overruled. *Gauntt v. State*, 335 S.W. 2d 616, 619; *Cook v. State*, 388 S.W. 2d 707, 709.

From all of the testimony of the witness Miramontes, it is apparent that he was aware of the fact at the time that appellant, who he testified had a pistol and was beaten by the deceased, fired the shot he heard.

The next ground of error relates to the argument of counsel for the state which it is contended referred to appellant's failure to testify.

The remarks complained of and the objection thereto are as follows:

"We must base our case on circumstantial evidence if we do not have a confession, that is admissible, made by the Defendant or if there is no eye witness who is willing to testify to what he saw. If we don't have that eye witness who will give testimony or a confession, then the State in every criminal case must depend on circumstantial evidence. So, you can see, of course, that the law realizes that they will not say just because a man won't tell you what he saw or just because the Defendant won't confess that we can't try him.

"MR. BARCLAY: If the Court please, I'm going to object to that line of argument. I believe he's commenting on the failure of the Defendant to testify.

"THE COURT: Overruled.

"MR. BARCLAY: Exception."

In his brief reference is made to the foregoing and to remarks objected to on other grounds or without stating any ground.

The complained of remarks above quoted were made in connection with the charge on circumstantial evidence and do not constitute a reference to the defendant's failure to testify in his own behalf.

Appellant's ground of error No. 4 relates to the failure of the trial court to give proper admonitory instructions or grant mistrial when counsel for the state argued that appellant carried a pistol and carried one into the cafe.

The remarks to which objection was addressed clearly reflect that counsel submitted as a reasonable deduction from the evidence that appellant had the pistol on him when he went in the cafe. We see no error.

The remaining claim of error relates to the denial of appellant's requested charge on self-defense.

The argument is advanced that appellant was entitled to his requested charge on self-defense against milder attack under Art. 1224 P.C.

No objections to the court's charge appear in the record.

The question of whether self-defense against a milder attack may be raised by circumstantial evidence or was raised in this case by the testimony of Miramontes is not before us.

The record contains a request for a charge on self-defense against an attack giving rise to a reasonable expectation or fear of death or serious bodily harm, which was properly denied since the evidence did not raise the issue.

We find no bill of exception or request for a charge on self-defense against a lesser attack in the record.

The judgment is affirmed.

WOODLEY,
Presiding Judge.

(Delivered December 6, 1967.)

* * * *

DISSENTING OPINION—Delivered December 6, 1967

Appellant's first and principal ground of error should be sustained. The officers had no arrest or search warrant. It is clear that appellant was under arrest. The

following testimony by Officer Brown on cross examination was not set forth in the majority opinion:

"Q. I see, when you ascertained his name, was he free to leave?

A. No.

Q. So, all right, so during the time that you had this conversation with him pertaining to the gun, he was under arrest, is that correct?

A. Yes. After I found out his name."

This search cannot be justified under the rule announced by the Supreme Court of the United States in McDonald v. U.S., 335 U.S. 451, 93 L ed 153, 69 S. Ct. 191, and Warden v. Hayden, 1 Cr L 3059. In the case at bar four hours had elapsed from the time the officer began his investigation to the time of the arrest. In McDonald, *supra*, the Court said, "This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike."

To hold as the majority does would authorize coercive type warrantless entry of any citizen's bedroom at four o'clock in the morning by a number of armed police officers seeking information. This is and always has been prohibited by our Constitution.

This cannot be a case of invitation or consent because the identity of the lady who admitted the officers was not shown. The officer could not recall who lived at the address where the search was made. There was no testimony indicating that appellant himself invited the officers in or consented to the search. He was alone in bed when four officers came and began to ask him questions. Under such circumstances, consent to search cannot be inferred or presumed. It cannot be said that appellant volunteered the information about the whereabouts of the pistol, because the officer said that "he didn't answer at first." Then, "I asked him again."

The proper rule, as I view it, has been enunciated by the Supreme Court of California in People v. Stockman, 407 P 2d 277; People v. Charles, 425 P 2d 545; and People v. Doherty, 429 P 2d 177. It is that "the prosecution bears the burden of proving that the statement in

question was not the fruit of a forbidden interrogation." People v. Charles, *supra*. It is conceded that no warning was given in the case at bar, and therefore, the interrogation was forbidden because the Miranda warning was not given.

I respectfully dissent.

MORRISON,
Judge

(Delivered December 6, 1967).

* * *

SUPREME COURT OF THE UNITED STATES

No. 68 Misc., October Term, 1968

REYES ARIAS OROZCO, PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 641 and placed on the summary calendar.

October 14, 1968